INTERIOR BOARD OF INDIAN APPEALS

Tom Slamans v. Acting Muskogee Area Director, Bureau of Indian Affairs

34 IBIA 230 (02/07/2000)

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VA 22203

TOM SLAMANS, Appellant	:	Order Reversing Decision
v.	:	
	:	Docket No. IBIA 99-14-A
ACTING MUSKOGEE AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS, Appellee	:	February 7, 2000

This is an appeal from an October 5, 1998, decision of the Acting Muskogee Area Director, Bureau of Indian Affairs (Area Director; BIA), increasing the monthly rental for Business Lease 57293 (the lease), which covered a .58-acre tract in Okmulgee County, Oklahoma, presently owned by Juanita Checotah, Creek NE.

In 1967, Katie Carruth Asbury, Fullblood Creek No. 1250, then the owner of the tract, executed a lease to Sunray DX Oil Company, for the purpose of operating a motor vehicle service station. The lease had an initial term of 10 years, beginning December 1, 1967, and gave the lessee the option of renewal for two additional five-year terms. The rent was based on a percentage of income. The lease was approved by the Area Director in 1968. 1/ Lease Paragraph 21 provided: "Lessee shall have the right to sublease the premises without approval of the owner or the Secretary."

In 1977, the lease was assigned to Appellant. In 1981, Appellant and Asbury executed an amendment to the lease, providing, inter alia: (1) that the property could be used for a motor vehicle service station and/or a convenience store; (2) that the initial term of the amended lease would end on August 31, 1984; (3) that Appellant would have the option of renewing the lease for three successive five-year terms; and (4) that the rent would be $300 per month during the initial term and $600 per month during the renewal terms. The amendment was approved by the Area Director on October 30, 1981.

1/ Only the year of approval is legible on the record copy of the lease.

On October 28, 1992, Appellant executed a sublease to the Creek Nation Okmulgee Indian Community. 2/ The initial term of the sublease was one year, ending October 28, 1993, with an option in the Community to renew for one five-year term. Rental under the sublease was $2,460 per month, an amount which also covered certain personal property owned by Appellant. The sublease was not approved by BIA.

In July 1994, Appellant informed BIA that he intended to exercise his final option for renewal))an option which entitled him to a five-year renewal term beginning September 1, 1994, and ending August 31, 1999. At about the same time, Checotah, who had inherited the property from Asbury, contacted the Okmulgee Agency, asking why she had not been involved in the sublease and requesting that BIA either negotiate a higher monthly rent for her or terminate the lease.

By memorandum dated September 9, 1994, the Superintendent sought advice from the Field Solicitor. An attorney in the Field Solicitor's Office responded on January 18, 1995, stating that Checotah's consent to the sublease was not required because of Paragraph 21 of the lease, a provision authorized by 25 C.F.R. § 162.12(b). 3/ He also stated that, when the lease was amended in 1981 to provide for a flat rental, rather than a rental based on a percentage of income, it became subject to 25 C.F.R. § 162.8. 4/ He therefore recommended that BIA conduct an economic review and that it notify Appellant of its intent to do so.

2/ According to a Sept. 9, 1994, memorandum signed by the Superintendent, Okmulgee Agency, BIA, this entity is "a tribally chartered Indian Community of the Muscogee (Creek) Nation."

3/ 25 C.F.R. § 162.12(b) provides:

"With the consent of the Secretary, the lease may contain a provision authorizing the lessee to sublease the premises, in whole or in part, without further approval. Subleases so made shall not serve to relieve the sublessor from any liability nor diminish any supervisory authority of the Secretary provided for under the approved lease."

This provision was in effect in 1967, when the lease was approved, and remains in effect today.

4/ 25 C.F.R. § 162.8 provides in relevant part:

"Except for those leases authorized by § 162.5(b)(1) and (2), unless the consideration for the lease is based primarily on percentages of income produced by the land, the lease shall provide for periodic review, at not less than five-year intervals, of the equities involved. Such review shall give consideration to the economic conditions at the time, exclusive of improvement or development required by the contract or the contribution value of such improvements."

On May 25, 1997, the Realty Officer of the Muscogee (Creek) Nation notified Appellant that the Nation would be conducting an economic review of the lease. 5/ An appraisal was prepared. On June 27, 1997, the Nation's Realty Officer wrote to Appellant, stating: "We have received the Rental Appraisal Report and it recommends annual rental be increased to $20,100.00. Therefore, in accordance [with] 25 CFR § 162.8, effective July 1, 1997, you will need to adjust your monthly rental payment to $1,675.00."

Appellant appealed this notice to the Area Director. The Area Director found the appeal to be premature. The Superintendent then issued a decision, dated September 12, 1997, imposing the recommended rental increase "retroactively effective July 1, 1997." 6/

Appellant appealed the Superintendent's decision to the Area Director. On October 5, 1998, the Area Director affirmed the Superintendent's decision.

The Board has often described its standard of review in rental adjustment cases. See, e.g., Gossett v. Portland Area Director, 28 IBIA 72, 74 (1995), quoting from Strain v. Portland Area Director, 23 IBIA 114, 118 (1992):

> The Board does not substitute its judgment for BIA's. Rather, it reviews a rental adjustment to determine whether it is reasonable, that is, whether it is supported by law and substantial evidence. The Board overturns a BIA determination only when it finds the determination is unreasonable. * * * The burden of proving a rental adjustment unreasonable is on the person who challenges it. [Citations omitted.]

Appellant argues, inter alia, that the appraisal upon which the Superintendent's decision was based is inadequate because it is conclusory and "provide[s] no meaningful information by which [the appraiser's] hypothesis could be tested, supported or refuted." Appellant's Opening Brief at 5.

5/ The Nation performs BIA realty services under its Self-Governance compact.

6/ The Superintendent indicated that he was uncertain as to whether the Nation was authorized under its Self-Governance compact to make rental adjustments to leases. The Nation evidently believed that it had that authority.

Given the Superintendent's Sept. 12, 1997, decision, no determination need be made here as to whether the Nation had such authority and, in any event, no determination could be made because no copy of the Nation's Self-Governance compact is included in the record. Cf. Smith v. Billings Area Director, 34 IBIA 114, 116 (1999), in which the Board held, following a review of the Blackfeet Tribe's Indian Self-Determination Act contract, that the contract did not authorize tribal personnel to approve modifications of leases.

Appellant's argument is well founded. The appraisal is cursory at best, making only the most general statements concerning the methodology employed and the comparables studied. Moreover, absolutely no supporting data is included. For example, there is not even a list of the comparables studied, let alone any analysis of those comparables.

Even under the Board's liberal standard of review in rental adjustment cases, this rental adjustment cannot pass muster. Where an appraisal presented in support of a rental adjustment consists entirely of conclusory statements and lacks any supporting data whatsoever, the appraisal does not constitute substantial evidence.

The Board finds that the rental adjustment in this case is unreasonable because it is not based on substantial evidence.

Ordinarily, upon reaching such a conclusion, the Board would remand the matter to BIA for preparation of a new appraisal. However, Appellant's lease has now expired, making the rental adjustment issue moot. Thus, the matter comes to an end with this decision.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Area Director's October 5, 1998, decision is reversed.

//original signed
Anita Vogt
Administrative Judge

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Kathryn A. Lynn
Chief Administrative Judge